No. 82-1916

in the Supreme Court of the United States

EMPRESA ECUATORIANA DE AVIACION, S.A.,
Petitioner,

vs.

DISTRICT LODGE NO. 100,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
J. G. CATES AND JULIANA MENOSCAL,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE DISTRICT COURT'S ACTION INQUIRING INTO THE NECESSITY FOR EACH INDIVIDUAL REPLACEMENT HIRED DURING A WORK STOPPAGE UNDER THE RAILWAY LABOR ACT WAS A PROPER EXERCISE OF ITS EQUITABLE POWERS IN LIGHT OF ITS STATUTORY OBLIGATION PURSUANT TO THE RAILWAY LABOR ACT TO ENSURE THE CONTINUANCE OF THE EMPLOYER-EMPLOYEE RELATIONSHIP AND TO AVOID INTERRUPTION OF SERVICE TO THE PUBLIC.[1]

II

WHETHER A DISTRICT COURT, PURSUANT TO ITS EQUITABLE POWERS TO EFFECTUATE THE PURPOSES OF THE RAILWAY LABOR ACT, MAY AWARD BACKPAY, SENIORITY AND OTHER EMPLOYMENT RELATED BENEFITS TO EMPLOYEES WHOSE EMPLOYER IMPROPERLY DENIED THEM REINSTATEMENT TO THEIR EMPLOYMENT.

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[1]This issue has been rendered moot by the Petitioner's reinstatement offers to each of the four employees whom the District Court found to be improperly replaced. See Argument II, *infra*.

III

WHETHER EMPLOYEES WHO WERE PROPERLY REPLACED DURING A LABOR DISPUTE UNDER THE RAILWAY LABOR ACT ARE ENTITLED TO BE PLACED ON A PREFERENTIAL HIRING LIST TO BE REHIRED WHEN THEIR REPLACEMENTS LEAVE OR WHEN A SIMILAR VACANCY OCCURS WHEN THE EMPLOYER SPECIFICALLY INFORMED THEM THAT THEY WOULD BE PLACED ON A PREFERENTIAL HIRING LIST AND THE EMPLOYER TESTIFIED, WITHOUT QUALIFICATION, AS TO THAT OBLIGATION BEFORE THE DISTRICT COURT.

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COUNTERSTATEMENT OF THE CASE

The Respondents, DISTRICT LODGE 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, J. G. CATES and JULIANA MENOSCAL (hereinafter District 100 or Union) cannot accept Petitioner's Statement of the Case. The decision of the United States Court of Appeals for the Eleventh Circuit, due to the fact that it involved the exercise of the District Court's equitable powers under the Railway Labor Act (hereinafter RLA or Act), turned upon the specific facts involved in the case. Several facts important to a clear and complete understanding of the case were not contained in the Petitioner's Statement of the Case. Accordingly, the Union is compelled to set forth its Counterstatement of the Case.

At noontime, on Monday, April 9, 1979, a substantial number of employees of Empresa Ecuatoriana de Aviacion (hereinafter Ecuatoriana or carrier), without authorization from the Union, ceased working, wrote sick on their time cards and departed from their place of employment. The walkout was apparently in response to a number of problems, the culminating event being the institution of a training program which the employees suspected, contrary to the representations of the carrier, was an attempt to cross utilize employees in violation of the Collective Bargaining Agreement (hereinafter CBA).[2]

On that same afternoon, April 9th, or early the following day, Tuesday, April 10th, the General Manager

[2]The other problem being the carrier's failure to process and arbitrate grievances in the manner prescribed in the CBA.

of the carrier authorized his managers to begin permanently replacing the employees participating in the strike. The managers, including the General Manager, were well versed in the hiring of replacements as the managers, several days before the strike, had conferred for several hours with one of the carrier's many attorneys (Greene). At that meeting, the attorney instructed the managers that in the event of a strike, the carrier should permanently replace the strikers and he had drafted all the documents necessary to implement that replacement of strikers. There was no instruction and/or discussion from the attorney concerning the carrier "running" to Federal Court to seek an injunction restoring the status quo ante to continue the operation of the airline. At the same time, on April 10th, as the managers were hiring replacements, the General Manager met with two of the carrier's other attorneys (Manas and Marcus) who, using the papers, letters and contracts of employment drafted by Attorney Greene, before he left on vacation, drafted letters of replacement. These letters, which were not postmarked until that afternoon, were not received by the employees until Wednesday, April 11 or Thursday, April 12, well after the carrier had already issued an order to replace and did replace the strikers. The letters of replacement did not state that the employees should return to work by a certain day or they will be replaced. They merely said that steps were being taken to replace them. No other communication with the strikers was attempted by the carrier to secure their return to work. On that same day, Tuesday, April 10, while the carrier had still not filed pleadings in District Court seeking an injunction enjoining the strike and restoring the status quo, the

carrier's General Manager ordered another of the carrier's attorneys in New York to file a complaint for damages against the Union in New York.

On Wednesday, April 11, in the afternoon, while the carrier was continuing to replace the strikers, the carrier, for the first time, sought to utilize the injunctive power of the District Court in order to enjoin the strike. The Court, upon this application, promptly scheduled an emergency hearing for the following afternoon, Thursday, April 12, 1979.

On Thursday, April 12, the Court, after argument of counsel and based on the pleadings, entered its Temporary Restraining Order, *inter alia*, enjoining the Defendants from engaging in a strike, ordering them to return to work for their next regularly scheduled shift, and enjoining the carrier from failing to properly process grievances. The Order did not, despite requests by the Union, restore the status quo ante to the time prior to the strike and concomitantly prior to the carrier's permanent replacement of strikers.[3] The Court further retained jurisdiction for all purposes including the issues concerning replacement as based on the representations of the carrier, the issue of replacements was not ripe for determination.

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[3]The fact that the carrier, prior to seeking injunctive relief from the District Court, replaced any of the employees was raised by the carrier's attorney but he stated that the extent of the replacement was ". . . an instance of one or more replacements" not the replacement of approximately 60%-70% of those who participated in the strike.

On Friday, April 13, the employees, pursuant to the Court Order, returned to work only to be told by management that they had been permanently replaced. In all, approximately 60%-70% of those who engaged in the walkout were replaced. The carrier, upon informing the employees that they had been replaced also informed them that they would be afforded the same or similar positions with the carrier when vacancies occurred in the work force.[4]

On that same day, Friday, the Union in response to the carrier's radical change in the composition of the work force, to-wit: replacement of 35-39 of the 50-52 employees who participated in the strike, a fact not disclosed at the hearing less than 24 hours before, filed its Motion for Emergency Relief and Rule to Show Cause requesting that the carrier cease and desist from its illegal replacement of employees; and that the Court restore the status quo ante as of that time period prior to the permanent replacement of the strikers. On that same day, the Court entered its Rule to Show Cause scheduling a hearing for April 19 concerning the issue of replacements. The Court, after argument of counsel, refused to restore the status quo ante and denied reinstatement to all the replaced employees. Instead, the Court scheduled hearings to determine the reasonableness of the carrier's actions in hiring replacements.

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[4]Ecuatoriana, through its attorneys, also advised the District Court, on at least two occasions, that the replaced strikers would retain residual rights to their jobs and would be placed in a preferential hiring position.

After several days of hearing the Court entered its Findings of Fact and Conclusions of Law and held that the carrier had the right to replace strikers where necessary to continue its operation. The Court also held that, to protect the goal of continuance of the employer-employee relationship, it had to pass on the necessity of each replacement and determined that all but four replacements were necessary under the facts and circumstances thereby deeming these replacements as permanent hires displacing the former employees. The District Court did not address the issue as to the future employment rights (preferential rehiring rights) of those displaced employees.

With respect to the four employees wherein the District Court found them to be improperly and/or unnecessarily replaced by the carrier, the Court ordered them reinstated to their employment but denied them backpay and employment related benefits.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the Court, *inter alia*,[5] affirmed the authority of the District Court to scrutinize the necessity of each replacement pursuant to its equitable power to ensure satisfaction of the goals and objectives of the RLA. The Court, however, reversed that portion of the District Court's decision which declined to award

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[5]The Court of Appeals also affirmed, under the circumstances of this case, the right of the carrier to replace strikers where necessary to its operation. It declined to lay down a per se rule that any time a minor dispute is in progress and the union strikes, the carrier may replace strikers before seeking equitable relief. Neither party, however, seeks review of this portion of the Eleventh Circuit's Order.

backpay and other employment related benefits to those strikers who were unnecessarily replaced. Based upon the District Court's equitable discretion to ensure compliance with the goals of the RLA, the Court held that those unnecessarily replaced employees were entitled to all remedies which normally accompany reinstatement, including backpay and other employment related benefits. The Court also held that strikers were entitled to be placed on a preferential hiring list to be rehired when the replacements quit or when a similar vacancy arose.

ARGUMENT

I

THIS PETITION PRESENTS NO IMPORTANT ISSUE WORTHY OF REVIEW BY THIS COURT.

The decision of the Court of Appeals neither conflicts with that of other federal or state courts nor does it involve a departure from the accepted and usual course of judicial proceedings requiring this Court's exercise of its power of supervision. Further, it does not involve any important question of federal law which has not been, but should be, settled by this Court. Rather, the decision involves the application of legal and equitable principles, which have, time and time again, been utilized by the courts in order to effectuate purposes of the RLA, to the narrow and particular facts and circumstances of this case. Accordingly, in view of the fact that the decision of the Court of Appeals rests upon the intertwining of particular and specific facts with well established legal and equitable principles, it is thereby of importance only to the particular litigants involved and does not warrant review by this Court on certiorari. See *National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498 (1951); *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923); *Fields v. United States*, 205 U.S. 292 (1907).

The Petitioner's request for this Court's review of the decision of the Court of Appeals is based upon its unfounded and improper application of the fundamental premises and principles of the National Labor Relations Act (hereinafter NLRA), 29 USC §151 et. seq. to the

instant case, arising under the RLA. Although this Court has on occasion referred to the NLRA for assistance in construing the RLA, see *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Brotherhood of Railroad Trainmen, etc. v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), this Court has consistently emphasized the many fundamental differences between the respective Acts:

> "The relationship of labor and management in the railroad industry has developed a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act. *Brotherhood of R.T. v. Chicago R. & I. R. Co.*, 353 U.S. 307 at 32 N.2 (1957).

As a result of those fundamental differences, this Court has consistently cautioned against wholesale importation of NLRA principles into the RLA:

> "It should be emphasized from the outset, however, that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Jacksonville Terminal Co., supra*, at 383.

See also *National Airlines, Inc. v. International Ass'n. of Machinists and Aerospace Workers*, 416 F.2d 998 (5th Cir. 1969); *cert. denied* 400 U.S. 992 (1971) (hereinafter NAL I); *United Ind. Workers of Seafarers I.U. v. Board*

of Tr. of Galveston Wharves, 400 F.2d 320 (5th Cir. 1968), *cert. denied* 397 U.S. 926 (1970).

In the instant case, the Petitioner in its zeal to request this Court to review this case based upon NLRA principles, has overlooked one of the fundamental principles, not found under the NLRA but strongly embraced by the RLA, the policy of continuance of the employer-employee relationship. In comparing the relevant differences between the NLRA and the RLA, Judge Wisdom of the Fifth Circuit Court of Appeals succinctly stated:

> ". . . the Railway Labor Act is more concerned than the National Labor Relations Act with continuance of the employer's operations *and the employer-employee relationship.* This is evidenced by the fact that while bargaining is the first and last step under the NLRA, it is only the first step under the Railway Labor Act in a ladder that leads to the White House if differences cannot be resolved. *Galveston Wharves, supra* at 329, 330. (Emphasis added)

This statutory purpose of the Act, the continuance of the employer-employee relationship, along with its twin purpose, the encouragement of collective bargaining to avoid interruptions to commerce were, with respect to all three Questions Presented for Review, properly balanced by the Court of Appeals so as to effectuate the policies of the RLA. It recognized the carrier's right, when confronted with an illegal strike, to have replacements which were necessary to fulfill its obligation to operate. Concomitantly, it preserved the continuance of the employer-employee relationship by scrutinizing

each and every replacement but only to the extent that the relationship, strained by an illegal strike, did not interfere with the carrier's obligation to the public to operate. Where the twin policies conflicted, the Court of Appeals opted for the carrier's right to permanently replace the striking employees in order to operate. Additionally, it preserved the continuance of the employer-employee relationship by providing for all those employees necessarily replaced during the work stoppage to be placed on a preferential hiring list to be offered reinstatement when their replacement quits or when a vacancy arises.

The Petitioner's reason for requesting review by this Court, to-wit: to establish a consistent legal framework within which employers confronted with an illegal strike under the RLA may respond, is improperly premised upon an NLRA analysis of this case arising under the RLA.

The Petitioner's failure to address, in its Petition, the statutory policy of continuance of the employer-employee relationship and that policy's role in the decision of the Court of Appeals significantly distorts the importance of Petitioner's Questions Presented for Review. The "consistent framework" upon which the Petitioner bases its request for review is, in fact, embodied within the decision of the Court of Appeals. The careful balancing by the courts of the RLA's twin statutory objectives including the continuance of the employer-employee relationship, in light of the specific facts and circumstances of each case, provides the "framework" contemplated by Congress in enacting the RLA and consistently followed by the courts. See Argument III, infra.

Accordingly, the Petitioner presents no important question of federal law requiring decision by this Court.

II

THE DECISION OF THE COURT OF APPEALS IS, IN PART, MOOT.

The Petitioner, in its first Question Presented for Review, seeks this Court's review of the question as to whether the District Court abused its discretion by scrutinizing the necessity for each replacement hired by a carrier confronted with an illegal strike under the RLA. The District Court held, after scrutinizing the necessity for each replacement, that four employees (Montessinos, Sosa, Rodriguez and Ferrer) were improperly replaced and were entitled to reinstatement to their employment with the carrier. The Petitioner cross appealed, *inter alia*, on that issue but later informed the Court of Appeals, prior to oral argument, that it would not argue either (a) that the District Court erred in finding that Sosa, Ferrer and Montessinos were not necessary, or (b) that the District Court erred in substituting its judgment for that of the carrier concerning the aforestated. The reason given by the Petitioner was that the claims were moot by virtue of offers of reinstatement. The Petitioner, however, did emphasize that the aforestated issues would be argued only with respect to Rodriguez, the fourth replacement. (Resp. App. at 1-4). The Court of Appeals, in its opinion, stated, with respect to the claims of Montessinos, Sosa and Ferrer:

> "Four strikers, Sosa, Ferrer, Montessinos and Rodriguez, were held unnecessarily replaced.

> Sosa, Ferrer and Montessinos were offered reinstatement; Montessinos accepted, and the other two refused. The claims of these three for reinstatement are thus moot, and the airline has eschewed review of the necessity-of-replacement issue with respect to them." (Petitioner's App. at 15.)

Since the decision of the Court of Appeals, the Petitioner has offered reinstatement to Rodriguez in compliance with, *inter alia*, the decision of the District Court, affirmed by the Court of Appeals. Moreover, Ecuatoriana, as part of an overall settlement of the claim of Rodriguez, agreed that:

> ". . . in the event that it files a Petition for Writ of Certiorari in the United States Supreme Court seeking review of the decision of the Eleventh Circuit Court of Appeals in Case No. 80-5349, Ecuatoriana shall not seek review of any portion of said decision dealing with the replacement, reinstatement, termination, backpay entitled or any other issues relating to Frank Rodriguez." (Resp. App. at 6,7.)

Accordingly, with the offer of reinstatement to Rodriguez and subsequent final settlement of all his claims, each and every employee whom the District Court held to be improperly replaced has been offered reinstatement by the Petitioner. The parties, thus, lack a legally cognizable interest in the outcome of the issue and, therefore, the Petitioner's first Question Presented for Review is moot. See *Boston Firefighters v. Boston Chapter, NAACP*, ____ U.S. ____, 51 U.S.L.W. 4566 (1983); *Powell v. McCormack*, 395 U.S. 483, at 496 (1969);

Fla. Board of Business Regulation, NLRB, 605 F.2d 916 (5th Cir. 1979).

III

THE DECISION OF THE COURT OF APPEALS IS CORRECT IN THAT IT IS BASED UPON WELL ESTABLISHED LEGAL AND EQUITABLE PRINCIPLES.

Assuming arguendo that the Petitioner's first Question Presented for Review is not moot, the decision of the District Court affirmed by the Court of Appeals regarding its discretion to scrutinize the necessity of each replacement is correct.

The law is well settled that district courts whose injunctive power have been invoked in a labor dispute under the RLA are constrained to utilize their equitable powers to fashion relief which is in compliance with the policy of the Act. *NAL I, supra; Galveston Wharves*, supra. Under the RLA, the equitable powers of the courts are guided by the twin policies of the Act, the continuance of the employer-employee relationship and the encouragement of collective bargaining in order to avoid interruptions to commerce. Ibid.

The District Court, in the instant case, acted well within its equitable discretion. It undertook extensive and meticulous fact finding in order to determine whether each replacement hired was necessary for the continued operation by the carrier. In doing so, it ensured the carrier's right to operate while, at the same time, ensured the integrity of the employer-employee relationship.

The Petitioner's argument herein, as it was in the courts below, is based upon a fundamental misunderstanding of the RLA. The carrier's right to replace in *illegal strike situations* (minor disputes) does not emanate from the same origin as the right to replace in *lawful strike situations* (major disputes).[6] In lawful strike situations both sides have exhausted the mandatory statutory negotiations, mediation, status quo provisions of Section 6, 45 USC 156 and thus may utilize self help. On the other hand, in unlawful strike situations, the right to replace emanates from the district court's

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[6]Justice Rutledge, in *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945) explained the distinction between major and minor disputes under the RLA:

> "The first (major dispute) relates to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. *They look to the acquisition of rights for the future*, not to assertion of rights claimed to have vested in the past.
>
> The second class (minor disputes), however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g. claims on account of personal injuries. *In either case the claim is to rights accrued, not merely to have new ones created for the future.*" Id. at 723 (Emphasis added)

exercise of its equitable powers to effectuate the RLA's twin statutory objectives rather than from the status quo provisions and, consequently, self help is not available to either party (Petitioner's App. at 12). *Detroit & Toledo Shore Line Railroad Company v. United Transportation Union*, 396 U.S. 142 (1969); *Jacksonville Terminal, supra; NAL I, supra.* If this Court was to subscribe to the Petitioner's argument that in unlawful strike situations a court may not scrutinize the necessity of each replacement but must defer to the business judgment of the carrier, it would be "turning the RLA on its head" by judicially creating a right of self help in situations where none was intended.

Accordingly, the District Court's scrutinizing of each and every replacement under the facts and circumstances of this case was a proper exercise of its equitable power in that it preserved the integrity of the RLA.

In addition to the propriety of the decision concerning the District Court's scrutinizing of each replacement, the Court of Appeals' award of backpay and other employment related benefits to the four unnecessarily replaced employees is also correct.

The law is well settled that in the area of reinstatement rights and that which constitutes appropriate relief for improper and/or illegal actions under the RLA, the courts have adopted the "make whole remedy", to-wit: an award of backpay and other employment related benefits to the injured parties. *NAL I, supra; Galveston Wharves, supra.*

In the instant case, the District Court, pursuant to its equitable powers and the balancing of the goals of the RLA, properly found that four employees were unnecessarily replaced and that the carrier improperly refused to reinstate them when they attempted to return to their employment. The District Court, however, improperly declined to award them backpay and other employment related benefits for the period commencing from the time they were improperly denied reinstatement until the carrier's subsequent offer of reinstatement based upon reasons of unjust enrichment and punishment for participation in an illegal strike. The Court of Appeals, however, properly rejected the reasoning of the District Court and awarded the four unnecessarily replaced employees backpay with all emoluments of employment for the aforestated period.

The decision properly effectuates the "make whole" remedy well established under the RLA.[7] In *Galveston Wharves, supra*, where employees were improperly furloughed in violation of the status quo, the Court set forth its rationale for an award of make whole relief to the affected employees, at 325:

> "The employees wrongfully laid off cannot be retroactively reinstated, but they can be retroactively compensated. This does not punish the Carrier. Nor does it constitute a windfall to the employees. It is the price of reconstructing the status quo; it compensates the employees for the losses incurred by their being laid off in violation of the Act."

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[7]The Petitioner's reliance upon NLRA cases is, as heretofore argued, misplaced. See Argument I, *supra*.

Moreover, in *National Airlines v. International Ass'n. of Machinists and Aerospace Workers*, 430 F.2d 957 (5th Cir. 1970) (hereinafter NAL II), where employees were engaged in an illegal strike, the Court held that the strikers illegal conduct and/or wrong was not a bar either to their reinstatement or to an award of backpay and other employment related benefits.

An award of backpay and other employment related benefits to those employees unnecessarily replaced and improperly denied reinstatement properly compensated those employees for their losses incurred as a result of the carrier's improper refusal to return them to their jobs. The award of backpay under the facts and circumstances constituted an exercise of judicial authority deeply rooted in judicial precedent.

Finally, the decision of the Court of Appeals concerning the replaced employees right to be placed on a preferential hiring list is correct in that it is based upon the evidence adduced at trial and well established legal and equitable principles utilized by the courts in order to ensure attainment of the purposes of the RLA.

This Court, in reviewing this issue, need only review the evidence adduced at trial, exhibits introduced into evidence, and representations by the Petitioner to the District Court in order to affirm the propriety of the decision of the Court of Appeals.

Ecuatoriana on several occasions by virtue of the testimony of its managers specifically voluntarily undertook the obligation to place all replaced employees on a preferential hiring list. It did so, both at the time when the employees attempted to return to their jobs

after the District Court enjoined the strike and ordered them to return to work and, again, several weeks later after grievances were filed by the replaced employees.[8] Moreover, on several occasions, the carrier's attorneys informed the District Court that these replaced employees maintained a preferential hiring position to be reinstated when their replacements left or vacancies occurred.

In addition to the fact that the obligation to maintain a preferential hiring list was specifically undertaken by Ecuatoriana, that obligation was also mandated by one of the twin statutory objectives of the RLA, the continuance of the employer-employee relationship. *NAL I, supra; Galveston Wharves, supra.*[9] It is only through the maintenance of that list that the courts can respect and promote the continuance of the employer-employee relationship. Moreover, without this hiring preference, there would be a severing of that relationship and, accordingly, the concept of replacement would be

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[8]The Court of Appeals, in another context, recognized this obligation undertaken by Ecuatoriana:

> "When the strike was ended by the TRO, strikers who had not been replaced were reinstated, no one was denied reinstatement because of misconduct, strikers replaced were told that if their replacements left or other positions opened up they would be recalled, and pursuant to this promise several strikers were reinstated after April 13." Petitioner's App. at 11.

[9]As was heretofore argued, the Petitioner's argument regarding this Question for Review is misplaced in that it improperly relies upon cases under the NLRA and fails to address the impact of RLA objective of continuance of the employer-employee relationship upon the instant case. See Argument I, *supra.*

indistinguishable from discharge—a result which the courts in cases arising under the RLA have specifically proscribed. See *NAL I, supra.*

CONCLUSION

The decision of the Court of Appeals is premised upon well established legal and equitable principles which, when applied to the unique facts and circumstances of this case, effectuates the purposes of the RLA. The propriety of this decision is firmly established and, accordingly, certiorari review by this Court is not warranted.

Respectfully submitted,

JOS. P. MANNERS, ESQUIRE
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1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

MANNERS, AMOON & TUCKER
4349 Northwest 36th Street
Suite 106
Miami, Florida 33166

By: /s/ George H. Tucker
GEORGE H. TUCKER

Attorneys for Respondents

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari was mailed (Prepaid First Class) on this 29 day of June, 1983, to: Harry Sangerman, Esquire, c/o McDermott, Will & Emery, 111 West Monroe Street, Chicago, Illinois, 60603.

MANNERS, AMOON & TUCKER

By: /s/ George H. Tucker
GEORGE H. TUCKER

Appendix

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All references made to the Respondents' Appendix in this Brief will be referred to as: Resp. App. at ____.

[RECEIVED NOV 25 1981]

November 24, 1981

Clerk of the Court
United States Court of Appeals
For the Eleventh Circuit
56 Forsythe Street, N.W.
Atlanta, Georgia 30303

Re: The United States Court of Appeals For the 11th Circuit, Case No. 80-5349 District Lodge 100, IAMAW et al v. Empresa Ecuatoriana de Aviacion

Dear Mr. Zoller:

This is to notify the Court that Ecuatoriana will not argue concerning the secretaries (Montessinos and Ferrer) nor the accounting clerk (Sosa). We also will not argue that the District Court erred in finding the three replacements were not necessary, nor that the District Court erred in substituting its judgement for the Carrier's, concerning the three.

The reason for this is that one of the three (Montessinos) has been reinstated and two of the three (Ferrer and Sosa) refused reinstatement despite a bona fide offer from the Carrier, and so the questions concerning them are moot.

Ecuatoriana intends to argue concerning the remaining salesman (Frank Rodriguez) because that issue is not moot.

Thank you for your cooperation.

Very truly yours,

/s/ ALAN DOUGLAS GREENE

Alan Douglas Greene
Attorney for Empresa Ecuatoriana de Aviacion

cc: Joseph P. Manners, Esq.
George H. Tucker, Esq.

[RECEIVED JUL 26 1982]

July 22, 1982

Mr. Joseph P. Manners, Esquire
General Counsel, International Association
of Machinists and Aerospace Workers
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036

No. 80-5349
EMPRESA ECUATORIANA DE AVIACION, S.A.
v. DISTRICT LODGE NO. 100, Et Al.

Dear Mr. Manners:

It has come to my attention that appellee's counsel, Alan Greene, wrote on November 24, 1981, to inform the court that the airline considers moot the claims of Ms. Montessinos because she has been reinstated and the claims of Ms. Ferrer and Ms. Sosa because they refused reinstatement. The file containes no response by appellants to the letter.

Appellants are requested to file a response within ten (10) days from today on whether the claims of Ms. Montessino, Ms. Ferrer and Ms. Sosa are moot in whole or in part.

Respectfully,

NORMAN E. ZOLLER, Clerk

By /s/ WARREN A. GODFREY
Warren A. Godfrey, Chief
Judicial Support Division

WAG: rcn

cc: Mr. George H. Tucker
Mr. Alan Greene

July 28, 1982

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Attn. Warren A. Godfrey

Re: Empresa Ecuatoriana de Aviacion, S.A.
vs. District Lodge No. 100, et al.
No. 80-5349

Dear Mr. Godfrey:

This letter is in reference to your letter of July 23, 1982 concerning Appellee's counsel statement that the airline considers moot the claims of Ms. Montessinos because she has been reinstated and the claims of Ms. Ferrer and Ms. Sosa because they refused reinstatement. That statement is true—but must be clarified because there are several claims concerning these persons.

The claims to which Mr. Greene is referring concerning Montessinos, Sosa and Ferrer are the *claims of Ecuatoriana* raised in *its* Cross Appeal, Issues VI and VII. (See letter of Greene dated November 24, 1981 and Brief of Appellee-Cross Appellant, Empresa Ecuatoriana de Aviacion, Issues VI and VII, pp. 44-50.)

With respect to those issues, Ecuatoriana, in its Cross Appeal, sought to reverse the Order of the District Court reinstating Sosa, Montessinos and Ferrer. However, Ecuatoriana rather than staying the Order of the District Court, instead elected to comply with said Order by

offering those three individuals reinstatement to their jobs. Ferrer and Sosa refused reinstatement and thus, their claims as to reinstatement with Ecuatoriana pursuant to the District Court Order (those involved in Cross Appeal Issues VI and VII) are moot. (See also Reply/Opposition Brief of Union Defendants, Footnote 8, p. 18.)

Montessinos, on the other hand, accepted the offer of reinstatement made by Ecuatoriana pursuant to the District Court Order. Ecuatoriana, however, by notifying the Court that it would not argue its Cross Appeal issue(s) concerning Montessinos thus rendered Cross Appeal Issues VI and VII moot with respect to Montessinos.

Despite the mootness of Ecuatoriana's Cross Appeal, Issues VI and VII, concerning Sosa, Ferrer and Montessinos, there still remain issues involving Sosa, Ferrer and Montessinos which are *not moot* and which were raised on appeal by the Union Appellants (see Brief of Appellants, Issue V, p. 45-50). The District Court ordered that the three aforestated employees be reinstated but denied them back wages and other employment related benefits for the period during which they attempted to return to work after the strike, April 13, 1979, and the date of the District Court Order, April 15, 1980. Accordingly, this issue with regard to Ferrer, Montessinos and Sosa is *not* moot and remains for determination by this Court.

If there are any further questions regarding the claims of Montessinos, Ferrer and Sosa, please advise.

Sincerely,

JOS. P. MANNERS and
GEORGE H. TUCKER

GHT:cz

cc: Jos. P. Manners, Esquire
Alan Greene, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 81-1083-CIV-EBD

DISTRICT 100, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Plaintiff,

vs.

EMPRESA ECUATORIANA DE AVIACION,

Defendant.

COMPLIANCE/SETTLEMENT AGREEMENT

The parties to this Agreement, Frank Rodriguez, District 100, International Association of Machinists and Aerospace Workers, (hereinafter IAM or Union), and Empresa Ecuatoriana de Aviacion, (hereinafter Ecuatoriana), in order to finally resolve their claims concerning Frank Rodriguez arising out of the District Court's Findings of Fact and Conclusions of Law in United States District Court Case No. 79-1795-Civ-WMH, Southern District of Florida, the same being subsequently appealed to the Fifth Circuit Court of Appeals Case No. 80-5349, to comply with the Final Judgment and Orders of the United States District Court, Southern District of Florida in Case No. 81-1083-Civ-EBD, and to resolve all other claims arising from the employment and termination of Rodriguez, STIPULATE AND AGREE as follows:

1. Ecuatoriana shall fully comply with the Award of the Arbitrator dated April 13, 1981 regarding the termination/grievance of Rodriguez and the Final Judgment of the District Court in Case No. 81-1083 dated October 12, 1982 except to the extent that Rodriguez waives reinstatement to any employment with Ecuatoriana and does hereby waive all future rights with respect to employment with Ecuatoriana.

2. In accordance with the Arbitration Award and Final Judgment of the Court, Case No: 81-1083-CIV-EBD, Ecuatoriana shall compensate Rodriguez and make him whole for all backpay and employment related benefits less any deductible interim earnings. The amount of backpay that Rodriguez shall be compensated shall be Twenty Thousand Five Hundred Seventy-Six Dollars and 57/100 ($20,576.57) less applicable payroll deductions and less Two Thousand Three Hundred Eighty-Six Dollars and 51/100 ($2,386.51) which Ecuatoriana shall, on behalf of Rodriguez, pay to the District 100 IAMAW Income Security Fund and less Three Thousand Four Hundred Twenty-Seven Dollars and 20/100 ($3,427.20) which Ecuatoriana shall pay on behalf of Rodriguez to the IAMAW Pension Fund. It is hereby agreed and understood that Ecuatoriana shall take all steps necessary to advise the IAMAW Pension Fund that Rodriguez shall be given past service credit for pension purposes from April 12, 1979 through the date of the execution of this Agreement in accordance with the April 1981 Award of the Arbitrator and the October 12, 1982 Final Judgment of the District Court in Case No. 81-1083-Civ-EBD. With the addition of the aforestated pension service credit, it is hereby agreed that Rodriguez is fully vested in said IAMAW Pension Fund and said vesting is a condition precedent to this Agreement. In

the event that Rodriguez is not fully vested in the IAMAW Pension Fund then Ecuatoriana agrees to compensate directly to Rodriguez the amount of the aforestated contribution, Three Thousand Four Hundred Twenty-Seven Dollars and 20/100 ($3,427.20).

3. Ecuatoriana shall withdraw its Notice of Appeal in the above-captioned matter presently before the Eleventh Circuit Court of Appeals Case No. 82-6115 and shall, now and forever, waive its right to contest the Final Judgment and/or Orders of the Court in Case No. 81-1083-Civ-EBD. Ecuatoriana further agrees, that in the event it files a Petition for Writ of Certiorari in the United States Supreme Court seeking review of the decision of the Eleventh Circuit Court of Appeals in Case No. 80-5349, Ecuatoriana shall not seek review of any portion of said decision dealing with the replacement, reinstatement, termination, backpay entitlement or any other issue relating to Frank Rodriguez.

4. Ecuatoriana shall pay to the Union its attorneys fees incurred in the prosecution of the aforestated case in the United States District Court, Southern District of Florida, in the amount of Eight Thousand Two Hundred Fifty Dollars ($8,250.00).

5. Rodriguez shall execute any documents, including a release of liability, reasonably requested to effectuate the terms of this Agreement.

6. In further consideration for this Agreement, Rodriguez and Ecuatoriana shall, by separate instrument, enter into a Settlement Agreement dismissing all pending State Court litigation in which Rodriguez and Ecuatoriana

are parties against each other. It is clearly understood by the parties that the Union is in no way involved with any of this litigation heretofore mentioned in this provision, number 6, and that any agreement to dismiss litigation between Rodriguez and Ecuatoriana is entered into without the advice and/or involvement and/or approval of the Union.

DATED at Miami, Florida on this 21st day of March, 1983.

FRANK RODRIGUEZ

EMPRESA ECUATORIANA
de AVIACION

INTERNATIONAL
ASSOCIATION OF
MACHINISTS AND
AEROSPACE WORKERS,
AFL-CIO